BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MURLIN L. GRAIKA	)	
Claimant	)	
	)	
VS.	)	
	)	
C & C SALES, INC.	)	
Respondent	)	Docket No. 1,003,230
	)	
AND	)	
	)	
SAFECO INSURANCE COMPANIES	)	
WAUSAU UNDERWRITERS INSURANCE CO.	)	
Insurance Carriers	)	

ORDER

Respondent and claimant requested review of the June 30, 2004 Award by Administrative Law Judge (ALJ) Robert H. Foerschler. The Board heard oral argument on November 30, 2004.

APPEARANCES

Timothy M. Alvarez, of Kansas City, Kansas, appeared for the claimant. Clifford K. Stubbs, of Roeland Park, Kansas, appeared for respondent and its insurance carrier Safeco Insurance Companies (collectively referred to as Safeco). Bruce L. Wendel, of Kansas City, Missouri, appeared for respondent and its insurance carrier Wausau Underwriters Insurance Company (collectively referred to as Wausau).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Following a regular hearing and the presentation of extensive evidence, the ALJ concluded claimant sustained an accidental injury arising out of and in the course of his employment with respondent. The ALJ found that claimant sustained an acute injury on

January 12, 2000, a period covered by Wausau,[1] and thereafter, sustained a series of injuries culminating on June 30, 2001, his last day of work for respondent a period covered by Safeco. As a result, the ALJ awarded claimant a functional impairment rating of 35 percent, which he assessed against respondent and Wausau, followed by a 43 percent work disability assessed against respondent and its subsequent insurer, Safeco. The work disability finding was based upon an average of a 100 percent wage loss and a 56 percent task loss, less the 35 percent functional impairment imposed against Wausau.

The ALJ initially calculated claimant's award to be a total sum of "$67,570.20 plus temporary total disability."[2] After the Award was issued he was asked by the parties to provide a breakdown of the respective carrier's liabilities, and on July 2, 2004 he issued a Supplemental Decision stating as follows:

> The [c]laimant is entitled to an award of $50,000 against the employer for the injury sustained January 12, 2000. This is comprised of 26.86 weeks of temporary total disability at $383 weekly and 99 weeks of permanent partial functional general impairment of 35%, for a total due of $50,000, payable at once. With credit currently due of $10,287.38 this would amount to $39,712.62 cash, according to K.S.A. 44-525(b).
>
> In addition [c]laimant is entitled to an award from the employer of the 43 percent additional work disability, arising out of the repetitive injury imputed to occur June 30, 2001, payable beginning on that date of $401.00 weekly, totaling $71,558.45. As of June 30, 2004, there would be due and payable in cash $62,556.00 followed by 22.45 weeks at $401.
>
> Credit under K.S.A. 44-510a would not be available, since the prior award of 35 percent was already deducted in the later award.[3]

The claimant along with both insurance carriers appealed the ALJ's Award. Claimant argues that the ALJ erred in failing to find he was permanently and totally disabled as a result of the January 12, 2000 accident. Claimant believes the evidence of his postural limitations along with his significant need for pain medications effectively preclude him from obtaining any substantial gainful employment. Although claimant alternatively pled this claim as one that included a series of repetitive injuries culminating on his last day of work, he earnestly maintains that both his functional impairment and

---

[1] Wausau provided coverage for respondent between January 12, 2000 up to July 15, 2000. As of July 15, 2000, respondent's coverage was provided by Safeco.

[2] ALJ Award (June 30, 2004) at 12.

[3] Supplement to Decision (July 2, 2004) at 1-2.

resulting work disability are the natural and probable result of the January 12, 2000 accident and are therefore, the responsibility of Wausau.

Both Safeco and Wausau filed a timely appeal and advance an extensive number of errors in the ALJ's Award. Their primary argument stems from the ALJ's conclusions relating to date of claimant's accident. Safeco believes claimant's initial accident, which occurred on January 12, 2000, falls within Wausau's coverage period, and was the sole, natural and probable cause of claimant's need for medical treatment, ongoing pain medications, his resulting functional impairment and the permanent restrictions, all of which are responsible for claimant's present inability to work. Moreover, Safeco specifically argues that the record contains no evidence to suggest claimant suffered a permanent aggravation of his preexisting condition while working for respondent from January 12, 2000 and up to his last date worked, June 30, 2001. Thus, Safeco maintains Wausau is responsible for the entirety of claimant's Award, not just the 35 percent functional impairment.

Assuming the ALJ's findings with respect to a date(s) of accident and Safeco are affirmed, Safeco alternatively alleges the ALJ erred in his findings relating to the nature and extent of claimant's permanent impairment, suggesting the evidence supports a lower work disability finding. In addition, Safeco contends claimant failed to provide timely notice or written claim as required by the Act and that the ALJ erroneously calculated the claimant's average weekly wage.

Wausau has also appealed and concedes responsibility for the 35 percent functional impairment which the ALJ found was attributable to the January 12, 2000 accident. However, Wausau asserts that it has responsibility for only the functional impairment as the ALJ correctly determined that claimant went on to suffer from a series of injuries while he continued to work for respondent. Thus, while Wausau believes the ALJ's Award should be affirmed, it also contends that it should be reimbursed by Safeco for those medical expenses it paid after its coverage terminated and was assumed by Safeco.[4]

The issues the Board must resolve are as follows:

1. Was claimant's worsening after the January 12, 2000 accident a natural consequence of that original injury, or was it instead a new and separate series of accidents;
2. If claimant sustained a series of accidents, whether timely notice and written claim were provided;

[4] The record does not disclose the precise amount Wausau believes it erroneously paid beyond its coverage period.

3. Claimant's average weekly wage on the date of his accident(s); and
4. The nature and extent of claimant's impairment, including work disability and whether he is permanently and totally disabled.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

At the time of the regular hearing claimant was a 49 year old individual who had been employed since 2000 as a field technician and installer for respondent's heating and cooling business. The evidence indicates claimant was paid $19.27 an hour although, depending on the job he was performing, his wage was dictated by the assignment and the local union's determination of "prevailing wage". The parties did not agree upon wage, but in an effort to be helpful, a collection of wage records were stipulated into evidence. Unfortunately, these records have not been explained and are not entirely legible. The ALJ made no express finding with respect to claimant's average weekly wage, although he referenced a vocational expert's opinion of "final earnings of $19.50 an hour, full time, with a 401K contribution and health insurance added."[5] Nonetheless, the parties agreed at oral argument that, regardless of the accident date found, claimant would qualify for the statutory maximum weekly benefit based upon the information provided.

On January 12, 2000, claimant was removing two jacks from a room and had to maneuver around some existing piping. In doing so, he felt a "pop" in his back. He kept working although he felt immediate low back pain and radiating pain in his legs.[6] Claimant notified his supervisor within the hour and even filled out an accident report.[7]

The next day claimant went to his own physician and was returned to work at light duty. After two weeks of light duty, claimant returned to his regular duties cutting "40 black steel pipe sections".[8] As he was performing this work, he noticed the pain in his legs and his back was increasing. He also began to experience numbness which hampered his

[5] ALJ Award (June 30, 2004) at 8.

[6] R.H. Trans. at 20.

[7] Wausau does not dispute notice of this January 12, 2000 accident nor timely written claim.

[8] R.H. Trans. at 24.

balance. Claimant testified that his pain became slowly worse and eventually was intolerable.[9]

On March 23, 2000, claimant had an MRI which revealed significant degenerative disk problems at the L3-4, L4-5 and L5-S1 levels. Another MRI was completed on May 16, 2001, revealing substantially the same results. Claimant was offered epidural injections in an effort to alleviate his pain, but they provided only slight relief. Nonetheless, claimant continued to work for respondent until June 30, 2001. The record indicates claimant was informally accommodated as he was allowed to self-limit his activities.

Claimant was referred to Dr. William O. Reed, Jr. who reviewed the MRIs and diagnosed substantial degenerative disc changes at L3-4, L4-5 and L5-S1, as well as significant spinal stenosis at L3-4 and L4-5.[10] The Grade 1 spondylolisthesis was present at L5-S1 and predated the first MRI of March 24, 2000. After all conservative efforts failed to provide relief and considering the results of the MRIs and other diagnostic tests, Dr. Reed recommended and ultimately performed a 4 level fusion on October 1, 2001, fusing claimant's spine from L2 to S1.

Claimant was released from active treatment on April 11, 2002 and given permanent restrictions of no lifting over 35 pounds continuously and 50 pounds occasionally along with "movement limitations".[11] These restrictions were occasional bending, squatting, kneeling, climbing, reaching and twisting, along with alternating standing and sitting.[12] When asked, Dr. Reed assigned a 17 percent impairment to the body as a whole, reflecting the four separate areas fused and utilizing Table 75 of the AMA *Guides*.[13]

Dr. Reed further testified that claimant was not, in his opinion, permanently and totally disabled, but that he sustained a 47 percent task loss based upon the vocational task analysis offered by Terry Cordray. However, Dr. Reed further testified that he was unaware that claimant's daily medications included 480 mg of Oxycontin.[14]

---

[9] *Id.* at 24 & 27.

[10] Reed Depo. at 8.

[11] *Id.* at 11.

[12] *Id.* at 19.

[13] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, (4th ed.). All references are to the 4th ed. of the *Guides* unless otherwise noted.

[14] Reed Depo. at 15.

Because the two carriers dispute their responsibility for claimant's claim, Dr. Reed necessarily faced a great deal of questioning on the nature of claimant's injury and whether his course of treatment stemmed from the single date of onset, January 12, 2000, or if it was the result of claimant's daily working activities for respondent.

Dr. Reed's testimony on this issue is less than clear. He was first asked to comment on the difference between the two MRI's. He indicated "the primary differences would appear to be attributable to advancing arthritic changes of the facet joints at L3-4, substantially L4-5, and to a lesser degree L5-S1. There were mild changes in terms of disc bulging present at each level as well."[15] Her further testified that:

> More likely than not the injury of 1/12/00 caused two things to occur, which can't really be separated because his treatment involved four levels of the spine, not just one.
>
> I believe it is safe to assume to a reasonable degree of medical certainty that the pop he heard was the completion of the spondylolisthesis at L5-S1, accompanying that was degenerative disc disease, and more significantly degenerative joint disease of the lumbar spine at levels L2-3, L3-4, L4-5 and L5-S1, which were aggravated by that injury of 1/12/00 and continued despite adequate conservative treatment modalities.[16]

Dr. Reed also testified that "[c]ontinuing to work would further the aggravation of the arthritic condition, but in a similar manner so would simply the activities of daily living, or the process of aging itself, so the work activities are considered an aggravating factor in terms of worsening of his condition, **but in no greater manner than the simple process of aging** as well."[17] Dr. Reed speculated that if he'd seen the patient on or about July 15, 2000 (the date the coverage began for Safeco), he'd have initially placed him on 35 pounds lifting limitation after review of plain films indicating the presence of spondylolisthesis, and that would have remained in place until such time as physical therapy could be instituted and further diagnostic tests performed and the result of his initial conservative treatment were known.[18]

In October 2002, at his lawyer's request, claimant was evaluated by Dr. P. Brent Koprivica. Dr. Koprivica diagnosed claimant with multilevel degenerative disk disease

---

[15] *Id.* at 7-8.

[16] *Id.* at 32.

[17] *Id.* at 9.

[18] *Id.* at 12-13.

which was aggravated by his work activities beginning on January 12, 2000 and extending through June 30, 2001.[19] As of the date of his report, Dr. Koprivica assessed a 35 percent impairment to the body as a whole under the 4th edition of the *Guides*, although there is no indication if this assessment was made under the DRE's or based upon a range of motion analysis. He imposed permanent restrictions of 50 pounds maximum lifting or carrying. Claimant was also directed to avoid frequent bending, pushing, pulling or twisting, squatting, crawling, kneeling or climbing except on rare occasions.[20]

While Dr. Koprivica initially opined that claimant sustained a 75 percent task loss based upon the task analysis prepared by Michael Dreiling, he modified that opinion during the course of his deposition testimony. At the time of his initial evaluation, claimant advised Dr. Koprivica that he was taking 80 mg of Oxycontin each day. Then, in preparation for his deposition, Dr. Koprivica was informed that claimant had increased his use of Oxycontin to 480 mg per day and Percocet has been prescribed due to his increased pain complaints. Dr. Koprivica testified that claimant's extensive use of narcotics is a "significantly negative prognostic consideration from a vocational standpoint."[21] He reasoned that an employee "has to be able to sustain activity. They [the employer] expect you to have a work product and if you're under the influence of narcotics to that extent, I don't believe that that's possible."[22] Indeed, he went on to opine that claimant is not able to engage in any type of substantial gainful employment and that he is, to a reasonable degree of medical certainty, essentially and realistically unemployable.[23]

Dr. Koprivica was asked to compare the MRI reports in an attempt to illicit an opinion as to whether claimant's condition was the result of the January 12, 2000 accident. Much like Dr. Reed, Dr. Koprivica equivocated. He testified that he did not see much difference between the two MRIs, although he only saw the written reports and not the actual films. He did admit that the surgery claimant had was appropriate for the condition identified on the initial MRI performed in March 2000. Dr. Koprivica further testified that it was fair to say his rating, task loss, and restrictions all relate to the January 12, 2000 accident. However, as a doctor, he testified that he interpreted claimant's injury as one that was as a result of continued aggravations because claimant continued to work until June 30, 2001. Indeed, Dr. Koprivica's report refers to the period January 12, 2000 up to

---

[19] Koprivica Depo., Ex. 2 at 7.

[20] *Id.*, Ex. 2 at 8.

[21] *Id.* at 23.

[22] *Id.* at 23.

[23] *Id.* at 29.

June 30, 2001. He further testified that claimant experienced the natural progression that one would expect in a patient who has a multi-level severe degenerative condition.

When asked, Dr. Koprivica testified that he could not say that if claimant had stopped work on January 12, 2000, that he would not have had to have the four level fusion ultimately performed in October 2001. He did however, acknowledge that claimant did not have the surgery until after the second MRI was performed in May 2001 (after Safeco assumed the coverage).

Dr. Edward J. Prostic also testified in this case. His testimony related solely to the date of claimant's accident and whether he sustained a series of accidents culminating on June 30, 2001. According to Dr. Prostic, who examined claimant on April 13, 2004, all of claimant's treatment related solely to the January 12, 2000 accident. Put simply, claimant would have required the treatment and surgery regardless of his ongoing activities after the date of his initial accident, January 12, 2000.[24]

Both vocational specialists testified that claimant retains the capacity to obtain employment making anywhere from $9 to $11 per hour, as a store clerk or shipping, receiving or traffic clerk. However, claimant is presently unemployed and neither of these individuals were apparently aware of the extent of claimant's present narcotic use.

Claimant testified that he has made phone calls inquiring about some entry level jobs as well as a security guard position and a position with the City of Ottawa. He estimates he made about 10 contacts up to the date of the regular hearing. However, claimant does not believe he's able to work an 8 hour day given his ongoing need for pain medications and to alter his positions, even to lie down as needed.

The Board has considered the entire record along with the parties' arguments and concludes that the greater weight of the evidence compels a finding that claimant sustained a single traumatic accidental injury on January 12, 2000, followed by temporary aggravations rather than any sort of series of injuries culminating thereafter. While it is true that claimant continued to work after his January 12, 2000 accident, that fact alone does not transform this claim into one involving a repetitive trauma.[25] Here, claimant's symptoms never subsided, nor did he ever reach maximum medical improvement. From the date of his acute injury, claimant's condition slowly continued to worsen even the treatment options made available to him did not aid in his recovery. Ultimately, surgery

---

[24] Prostic Depo. at 9-10.

[25] Due to the vagaries concerning the law on date of accident, the Board acknowledges that claimants are, out of an abundance of caution, sometimes compelled to plead a series of microtraumas to ensure the appropriate carrier is joined in the action.

was offered when all other conservative efforts failed. Dr. Prostic testified that claimant's January 12, 2000 accident led to the need for surgery and that claimant's ongoing work activities did not accelerate the need for surgery whereas Dr. Koprivica was not certain.

This is not an instance where it is difficult to ascertain the date an injury occurred as in claims solely involving repetitive use injuries. To the contrary, the Board finds that the entirety of claimant's medical care and his resulting inability to perform substantial gainful employment is due to the January 12, 2000 accident. Accordingly, respondent and its carrier Wausau are responsible for claimant's injury and the benefits available under the Act.

K.S.A. 44-510c(a)(2) defines permanent total disability as follows:

> Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

While the injury suffered by the claimant in this case was not an injury that raised a statutory presumption of permanent total disability under K.S.A. 44-510c(a)(2), the statute provides that in all other cases permanent total disability shall be determined in accordance with the facts. The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.[26]

In *Wardlow*,[27] the claimant, an ex-truck driver, was physically impaired and lacked transferrable job skills making him essentially unemployable as he was capable of performing only part-time sedentary work. The Court in *Wardlow*, looked at all the circumstances surrounding his condition including the serious and permanent nature of the injuries, the extremely limited physical chores he could perform, his lack of training, his being in constant pain, and the necessity of constantly changing body positions as being pertinent to the decision of whether the claimant was permanently totally disabled.

The Board finds that claimant is permanently and totally disabled as a result of his January 12, 2000 accidental injury. It is essentially uncontroverted that claimant's present

---

[26] *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

[27] *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 113, 872 P.2d 299 (1993).

postural limitations and his ongoing use of Oxycontin and Percocet are significant barriers to employment. Dr. Koprivica testified that claimant is unable to access the open labor market when he is taking an extensive number of narcotics because claimant is unable to sustain any activity, either in any sort of job or even in a vocational rehabilitation setting. The Board agrees and concludes claimant is permanently and totally disabled. He is, therefore, entitled to an award of $125,000 as provided in K.S.A. 44-510f, as well as future medical treatment.

The parties could not agree on an average weekly wage and merely presented a series of payroll records for the ALJ to interpret. The Board finds it unnecessary to decipher the records or remand this matter to the ALJ for clarification given the finding of permanent total disability. The Board has concluded claimant's average weekly wage was, based upon the wage records, sufficient for the statutory maximum weekly benefit of $383 based upon the January 12, 2000 accident.

In light of the Board's conclusion that Wausau is responsible for claimant's permanent total disability, the remaining issues advanced by Safeco are moot.

All other findings and conclusions contained within the ALJ's Award are hereby affirmed to the extent they are not modified herein.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Robert H. Foerschler dated June 30, 2004, is modified as follows:

The claimant is entitled to, against respondent and Wausau Underwriters Insurance Company, 27 weeks temporary total disability compensation at the rate of $383 per week or $10,341 followed by permanent total disability compensation at the rate of $383 per week not to exceed $125,000 for a permanent total general body disability.

As of December 28, 2004, there would be due and owing to the claimant 27 weeks of temporary total disability compensation at the rate of $383 per week in the sum of $10,341 plus 231.86 weeks of permanent total disability compensation at the rate of $383 per week in the sum of $88,802.38 for a total due and owing of $99,143.38, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $25,856.62 shall be paid at $383 per week until fully paid or until further order of the Director.

IT IS SO ORDERED.

Dated this _____ day of December 2004.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

c: Timothy M. Alvarez, Attorney for Claimant
Clifford K. Stubbs, Attorney for Resp. and its Ins. Carrier Safeco Ins.
Bruce L. Wendel, Attorney for Resp. and its Ins. Carrier Wausau Underwriters
Robert H. Foerschler, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director